IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 180 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

---

ISRAIL @ISRAR PAHELVAN NAZIRAHMED SHEIKH

Versus

STATE OF GUJARAT

---

Appearance:

1. Special Civil Application No. 180 of 2003

MR HR PRAJAPATI for Petitioner No. 1

MR MR PRAJAPATI for Petitioner No. 1

MR NAGES SUDH AGP for Respondent Nos. 1-3

---

CORAM : MR.JUSTICE D.K.TRIVEDI

Date of decision: 20/05/2003

ORAL JUDGEMENT

1. The petitioner - detenu, by filing this petition, has challenged the order of detention dated 03.08.2001 passed by the respondent No.2 namely Commissioner of Police, Ahmedabad City detaining the petitioner under Sub-Section (2) of Section 3 of the Gujarat Prevention of

Anti-Social Activities Act, 1985 (hereinafter referred to as the "PASA Act") and by way of committal order passed on the same day, the petitioner detenu was ordered to be kept at Bharuch District Jail and in the petition, several contentions were raised, while challenging the order of detention and along with the petition, he has annexed the order of detention dated 03.08.2001, the grounds of detention and the other material, which were relied upon by the detaining authority at the time of passing the order, a copy of the representation of Advocate Mr.H.R.Prajapati dated 09.12.2002 addressed to the detaining authority, the acknowledgment receipt of the said representation and the statement of Ushaben Sardarilal recorded by the police dated 17.05.2001. As found from the grounds of detention, two prohibition cases were relied upon by the detaining authority in which the detenu was involved as one of the accused. One prohibition case was registered at Prohibition Station on 15.01.2002 vide C.R. No.143/2001 for the offences under Sections 66(1)b, 65 a.e., 81, 83, 116(1)b of the Prohibition Act, and the police has, in that case, seized 312 bottles of foreign liquor worth Rs.1,23,900/- and auto rickshaw. The said case was under investigation and the accused was found absconding. The another case was registered at Rakhiyal Police Station vide C.R.No.5062/2001 on 26.07.2001 for the offences under Sections 66b, 65a, 81, 98, 99, 116b of the Prohibition Act and the police has seized 719 bottles of foreign liquor and bear worth Rs.1,04,850/-- and one mobile phone worth Rs.4,000/- and one Mahendra Voyjar Car-1 worth Rs.2,00,000/--. In addition to the prohibition cases, the police has recorded statements of two witnesses on 28.07.2001 and 29.07.2001 and the detaining authority himself has verified these two statements by calling two witnesses before him on 31.07.2001. As found from the statements of the witnesses, the witnesses have disclosed the prejudicial activities of the detenu, suffered by the respective witnesses in respect of such prejudicial activities at the instance of the detenu on 30.06.2001 and 05.07.2001 and has narrated by the witnesses that the public order in the area was disturbed at the instance of the petitioner - detenu. The detaining authority has in turn, after considering the material placed before him, satisfied that the petitioner is acting prejudicial activities to the maintenance of the public order and he is a confirmed bootlegger and with a view to prevent such prejudicial activities, he was satisfied that the order of detention detaining the detenu was required to be passed under the provisions of PASA Act. The order of detention dated 03.11.2002 is served upon the petitioner on 04.11.2002, as the petitioner detenu was absconding.

As found from the two prohibition cases registered against the petitioner, which were relied upon by the detaining authority, it shows that the petitioner was not arrested till the order of detention was passed and served on him.

2. Mr.H.R.Prajapati, learned advocate for the petitioner - detenu, while arguing the matter, has vehemently urged that the sponsoring authority has not placed the complete statement of Ushaben, which was recorded by the Investigating Agency in respect of prohibition case registered at Prohibition Station vide C.R.No.143 of 2001 on 15.01.2001. Mr.Prajapati has contended that the statement of Ushaben recorded by the Police on 17.05.2001 was not complete statement and sponsoring authority has withheld some portion of her statement. As found from the material annexed to the petition, there is one statement of Ushaben d/o. Sardarilal recorded by the Inspector, Prohibition & Excise, Special Striking Force, Gujarat State, Ahmedabad on 17.05.2001. She has given her statement in respect of the offence registered under the Prohibition Act, vide C.R.No.143/2001 in respect of her prohibition activities. This statement of Ushaben is referred to and furnished to the detenu at Item No.9 in the list of documents, relied upon by the detaining authority and furnished to the detenu and that Item No.9 is at running page Nos.25 to 28. The petitioner has also annexed the statement of Ushaben recorded by the police on 17.05.2001 at Annexure-D to this petition. The same was also recorded by the Inspector, Prohibition & Excise, Special Striking Force, Gujarat State, Ahmedabad. In the said statement of Ushaben, there is a question put by the Inspector to said Ushaben in respect of the detenu namely Israr Pahelvan i.e. present petitioner and the said Ushaben has in turn, stated that she knows by name. However, she has no business transaction with him and further that the muddamal seized by the police, she has not purchased from him. While relying upon the statement of Ushaben, it is the contention of Mr.Prajapati that the sponsoring authority has not placed the complete statement of Ushaben recorded by the police and as found from the complete statement of Ushaben, she has in turn exonerated the detenu in respect of muddamal bottles seized by the police in respect of the offence registered at Prohibition Station vide C.R.No.143/2001 and the sponsoring authority has deliberately withheld this material in the form of complete statement of Ushaben of the detaining authority. A specific ground has taken in the petition at ground No.(o) contending that the sponsoring authority has deliberately withheld certain

vital and important material from the detaining authority, for consideration and while placing the material in respect of the investigation papers of C.R.Nos.143/2001 and 5062/2001, the accused Rameshwar Gulabchand Gupta was apprehended by the police with the stock of liquor bottles without any pass or permit. In the said offence, the said Rameshwar Gulabchand Gupta has disclosed before the police that the said stock of liquor bottles belongs to Ushaben Sardarilal and said Ushaben is bringing stock of liquor from the petitioner. The said Ushaben Sardarilal was also arrested by the police in respect of her statement was recorded by the Investigating Agency on 17.05.2001. In her statement, she has stated that she had placed order for English liquor bottles to one Papaiya and she was delivered by one Kaliya s/o. Baliya Bhil and the said bottles were seized by the prohibition department. On the question being asked by the police to said Ushaben that whether she knows Israr Pahelvan i.e. the petitioner and she has stated that she knows the petitioner only by name, but she has no business transaction with him and no purchased the stock of liquor from the petitioner. The said Ushaben was also detained under PASA Act and, while furnishing the material to said Ushaben, she was furnished her statement recorded by the police on 17.05.2001. As observed earlier in the police statement, when she was asked by the Police Inspector, she has stated in the last but one paragraph as under :-

> "She knows the petitioner only by name Israr Pahelvan, but she has no business transactions with him nor she has purchased the stock of liquor from him"

3. While challenging the order of detention, one of the contention is raised in the petition by the sponsoring authority of the detaining authority and while furnishing the statement in the form of statement of Ushabenn was partly withheld and she has in turn exonerated the detenu in the said case and accordingly on that ground, the order of detention deserves to be set aside.

4. Mr.Nages Sudh, learned AGP for the respondents, while supporting the order of detention, has vehemently urged that the satisfaction recorded by the detaining authority is based upon the material and the detaining authority has rightly recorded the satisfaction that he is acting prejudicial activities to the maintenance of public order and with a view to prevent such activities, the order of detention was necessary and accordingly, the

order was passed. Mr.Sudh has also taken me through the affidavit filed by Mr.P.C.Pandey, namely detaining authority. In para-12 of the affidavit, the detaining authority has denied the allegation, averments and contentions made in para-4(o) of the petition and according to the detaining authority, the statement of Ushaben was supplied to the petitioner. At the time of serving the grounds of material, the statement of Ushaben is furnished to detenu recorded by the same Inspector on 17.05.2001 and in the said statement, the officer has recorded that what Ushaben has stated before him. I have also inquired from Mr.Sudh, learned AGP for the respondents that how many statement of Ushaben has recorded by the Investigating Agency and admittedly, when the two statements were found by the Police Inspector on 17.05.2001. In the said statement furnished to the detenu, in last but one paragraph of Ushaben is not found. In fact in the statement recorded by the Police on 17.05.2001, which indicates that a question was paused by the Inspector to Ushaben about the detenu and she has in turn, stated, which reads as under :

"She knows the petitioner only by name Israr Pahelvan, but she has no business transactions with him nor she has purchased the stock of liquor from him"

The said Police Inspector has recorded the statement and furnished the said statement to the detenu, which was relied upon by the detaining authority, which is not complete statement of Ushaben.

5. Mr.H.R.Prajapati, learned advocate for the petitioner has placed reliance upon the decision of the Hon'ble Apex Court in the case of Ayya alias Ayub Vs. State of U.P. & Anr. reported in AIR 1989 S.C. 364. The Hon'ble Apex Court, while considering the contention in respect of telegram, has observed in para-13, which I reproduce hereunder :-

"13. So far as the third ground is concerned it is not doubt a serious charge. The victim is the same Anil Gautham. The sessions court has since enlarged the petitioner on bail. It is alleged that the attack, in the manner in which it was made, spread tremors of fear in the neighbourhood and the shop-keepers in the vicinity pulled down their shutters.

On the contrary, petitioner avers that he had been taken into custody earlier at 8.00 p.m.

and his alleged presence at the scene of occurrence, which admittedly took place at 9.10. p.m. was wholly imaginary and concocted. The police version is that the arrest was made only at 10.00 p.m. the next day. These matters are to be decided at the sessions trial. We cannot decide them here. It is not also necessary to go into the controversy about the wireless message or the genuineness of the "Log-Book" recording the message. The Inspector General of Police Merrut Zone and the Home Secretary have stated in their affidavits that the extant practice is to keep the "Log-Book" in the form of loose sheets stapled together. The practice might perphaps require improvement, but it is not necessary to say that the sheets produced are not genuine Learned Sessions Judge at the time of grant of bail did not, however, accept them as the original "Log-Book".

It is equally unnecessary to decide whether the telegram despatched by Mirazuddin was at 12.30 mid-night on 18-2-88 or as suggested by the Respondents at 12.30 noon on 19-2-88. It is extremely probable that it was sent not at 12.30 mid-night as claimed by the petitioner, but only at 12.30 noon on 19-2-88 as suggested by Shri Yogeshwar Prasad. But it cannot be disputed that such a telegram was sent. This telegram asserts, for whatever it was worth, that petitioner was taken into custody at 8.00 p.m. on 18-2-88. The contention of Shri Garg is that the non-consideration of this telegram, which had a bearing on the complicity or otherwise of the petitioner in the alleged offence vitiates the detention for non-application of mind. The detaining authority in its affidavit says :

".....Deponent is not in a position to say about the facts of the telegram. It might have been given in pesh-bandi."

What weight the contents and assertions in the telegram should carry is an altogether a different matter. It is not disputed that the telegram was not placed before and considered by the detaining authority. There would be vitiation of the detention on grounds of non-application of mind if a piece of evidence, which was relevant though not binding, had not been considered at all. If a piece of evidence

which might reasonably have affected the decision whether or not to pass an order of detention is excluded from consideration. The detaining authority might very well have come to the same conclusion after considering this material, but in the facts of the case the omission to consider the material assumes materiality."

The Hon'ble Supreme Court, in turn, has held that the telegram was not placed before and considered by the detaining authority and there would be vitiation of the detention on grounds of non-application of mind if a piece of evidence, which was relevant though not binding, had not been considered at all. With reasonably affecting the decision whether or not to pass an order of detention is excluded from consideration, there would be a failure of application of mind which, in turn, vitiates the detention. The detaining authority might very well have come to the same conclusion after considering this material, but in the facts of the case the omission to consider the material assumes materiality and the Hon'ble Supreme Court has quashed and set aside the impugned order of detention passed by the detaining authority.

6. Mr.H.R. Prajapati has also placed reliance upon the another decision of the Hon'ble Apex Court, on the similar line, in the case of V.C. Mohan Vs. Union of India and others, reported in AIR 2002 S.C. 1205. The Hon'ble Supreme Court has observed in para-12, which I reproduced hereunder :-

"12. We would like to record, however, another more importance feature at this juncture : On an application before the Settlement Commission under Section 127-B of the Customs Act filed by the detenu on 8-2-2001 the Settlement Commission on 15-2-2001 after hearing the applicants and the Department, was pleased to admit the applications of the detenu and passed an order directing the detenu to make payment of additional duty of Rs.11,56,803/- within 30 days from the date of receipt of the order. Apart therefrom, the Commissioner further observed that the Commission shall have the exclusive jurisdiction on the case of the detenu, in terms of S. 127-F(2) of the Customs Act, 1962 to exercise the powers and perform the functions of any officer of customs, to the exclusion of all other officers of customs and it is on this score that Mr.Mani contended and if we may say so, rightly, that both the application and the order of the Settlement

> Commission, Southern Bench, Chennal dated 15-2-2001 ought to have been placed before the Detaining Authority - The records however depict otherwise : Neither the application nor the order passed thereon did see the light of the day before the Detaining Authority. There is no manner of doubt that the documents mentioned above are not only important but of definite impact in the matter of detention and having a bearing on to the issue. Under the circumstances, there thus stands a bounden obligation to place the same before the Detaining Authority for fair play and justice. The sponsoring authority conveniently kept it to itself a very relevant material which could have tilted the scale before the Detaining Authority. Needless to record that the sponsoring authority was able to place the letter from the Special Public Prosecutor regarding the condition of bail relaxation of the detenu dated 28-2-2001, but failed to place the orders of the Settlement Commission dated 8-2-2001 and 15-2-2001. Is it a lapse unintended or a deliberate failure ? The learned senior advocate appearing for the respondents however hadn't had any answer to the same. The factum of non-placement of relevant documents, in our view, has had a serious effect and definite inroad to petitioner's liberty without application of mind. Non-placement of the order of payment of additional duty of Rs.11,56,803/- within 30 days from the receipt of the order of the Commission has not only transgressed the rights of the petitioner but in our view speaks a volume about the conduct of the officials rendering the proceeding before the Detaining Authority vitiated and thus turned out to be illegal."

7. Applying the ratio of the aforesaid two decisions of the Hon'ble Supreme Court and as found from the facts in the present case, the detaining authority has considered the statement of Ushaben recorded by the Inspector of Prohibition & Excise, Special Striking Force, Gujarat State, Ahmedabad on 17.05.2001 placed by the sponsoring authority before him and as found from the statement of Ushaben, the sponsoring authority has not placed full statement of Ushaben and more particularly, the relevant statement of Ushaben, when recording officer has posed the question about the present detenu, she has in turn, in reply to the said question stated that she knows the detenu by name and she has no business relation

with him and the stock of liquor was seized by the police during the raid, was not purchased by her from the detenu. This part of the statement was withheld by the sponsoring authority and by withholding this part of the statement is fatal and only on that ground the order of detention deserves to be set aside.

8. In light of the aforesaid two decisions of the Hon'ble Court, the petition is allowed. The impugned order dated 03.08.2001 passed by the Commissioner of Police, Ahmedabad City is quashed and set aside. The detenu Shri Israil @ Israr Pahelvan Nazirahmed Sheikh is ordered to be released forthwith, if not required in any other case. Rule is made absolute accordingly. Direct service is permitted.

[D. K. Trivedi, J.]

vijay